

**Supreme Court of the United States**

**OCTOBER TERM, 1943.**

No. **244**

**THE MORRISDALE COAL COMPANY, Petitioner,**

**v.**

**UNITED STATES OF AMERICA, Respondent.**

**PETITION FOR A WRIT OF HABEAS CORPUS TO  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT AND BRIEF IN  
SUPPORT THEREOF.**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1943.

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No.

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THE MORRISDALE COAL COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT.**

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The petitioner, The Morrisdale Coal Company, a corporation, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled cause.

**OPINIONS BELOW.**

The opinion of the District Court of the United States for the Eastern District of Pennsylvania was filed on June 22, 1942 (R. 81-83), and is reported at 46 F. Supp. 356. That Court subsequently entered a supplemental opinion on Sep-

tember 23, 1942 (R. 84-85) dealing with the amount of the judgment to be entered herein which is reported at 50 F. Supp. 138.

The *per curiam* opinion of the United States Circuit Court of Appeals for the Third Circuit was filed on May 10, 1943 (R. 95), and is reported at 135 F. 2d 921.

### **JURISDICTION.**

The judgments of the United States Circuit Court of Appeals for the Third Circuit were entered on May 10, 1943 (R. 96-97).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

### **QUESTION PRESENTED.**

May the United States recover from petitioner and petitioner's surety upon a common law bond given solely for the protection of and naming as obligee only "Blakely D. McCaughn, Collector, First District, Pennsylvania"?

### **STATUTES INVOLVED.**

The statutes involved are Sections 3651, 3943, and 3950 of the Internal Revenue Code which are set out in the Appendix, *infra*, pages 12 to 14.

### **STATEMENT OF THE CASE.**

In 1921 Blakely D. McCaughn, the then Collector of Internal Revenue for the First District of Pennsylvania (R. 89, 93), demanded payment of additional income taxes which had been assessed against The Morrisdale Coal Company for the fiscal years ending in 1917 and 1918 (R. 6, 22, 69). That company concurrently filed abatement claims covering the full amount of the assessments (R. 7, 23, 33-34, 63, 69).

Mr. McCaughn acknowledged receipt of these claims and advised the coal company that:

\* \* \* these claims will not serve to withhold the collection of such taxes unless you furnish this office with a corporate surety bond covering the full amount of the claims. Enclosed you will find copy of the opening and closing paragraphs which must be embodied in the surety company's form. (R. 69.)

The coal company then advised McCaughn of a conference which its officials had had in Washington, D. C., with the Bureau of Internal Revenue in which it had been indicated that action upon the abatement claims would soon be taken. The company, therefore, requested McCaughn to withdraw his request for a bond. (R. 70.)

McCaughn's authorized deputy collector (R. 89) replied as follows:

\* \* \* this office is not familiar with the conference with the Revenue Department in Washington, to which you refer.

Inasmuch as the above tax has been assessed on the lists of this office the Collector for this district is *personally responsible* for the collection or adjustment of all such assessments. Consequently he requires the filing of a corporate surety bond made *in his favor for his own protection* in the event that your claim is disallowed by the Department. (R. 71; italics supplied.)

McCaughn throughout his tenure of office was under a statutory bond to the United States which he had given to secure the faithful performance of all the duties of his office (R. 75-78, 90).

On December 1, 1921, the coal company, as principal, and the American Re-Insurance Company, as surety, delivered to McCaughn "for his sole protection" (R. 65) the common law bond involved in this proceeding which bond embodied the opening and closing paragraphs dictated by McCaughn (R. 10-11, 69-70).

Prior to March of 1925 the additional taxes assessed against the coal company for 1917 were abated in part and the balance paid (R. 6, 22, 63, 81, 86).

On March 30, 1925, the Commissioner of Internal Revenue rejected the coal company's 1918 abatement claim (R. 34) and notified the company of such action by letter dated April 8, 1925 (R. 66-68). The statute of limitations on the collection of the 1918 tax, which had been assessed in 1921, as extended by a waiver (R. 50, 63), barred collection after April 30, 1925. Sections 250(d) of the Revenue Acts of 1918 and 1921.

McCaughn left office on December 31, 1927 (R. 89, 93), and by June 2, 1928, his liability to the United States had been settled in full (R. 80, 90). On March 13, 1933, the surety on the statutory bond given by McCaughn was released by operation of law (R. 79). 6 U. S. C. A. Sec. 5.

On May 15, 1939, the United States, alleging it was the real party in interest, instituted this suit in the District Court of the United States for the Eastern District of Pennsylvania against the coal company and the surety company on the common law bond delivered by them to McCaughn (R. 4-11). Thereafter, by a consent order entered by the Court, the surety company deposited the principal of the bond (with interest) in the registry of the District Court (R. 2, 86) and was permitted to withdraw. Said order provided that the coal company should have the right to defend on the ground that neither it nor the surety company is liable upon the cause of action alleged (R. 26-27).

The case was heard on a motion for summary judgment filed by the United States (R. 27-28) and a motion to dismiss filed thereafter by the coal company (R. 61-62). The District Court granted the motion for summary judgment as to that part of the bond covering the taxes assessed against the coal company for the year ending in 1918 (R. 85-86). The United States Circuit Court of Appeals for the Third Circuit affirmed, *per curiam*, the judgments of the District Court (R. 95).

## **SPECIFICATION OF ERRORS TO BE URGED.**

The court below erred:

1. In failing to find and hold that the bond sued on was requested and given solely for the personal protection of Blakey D. McCaughn.

2. In failing to construe the bond, if ambiguous, against the United States, since the material parts of it were dictated by the obligee under whom the United States claims.

3. In granting the motion for summary judgment when the evidence presented either showed as a fact that the bond sued on was not given for the benefit of the United States or presented a genuine issue of a material fact regarding this question.

4. In holding the United States to be the real party in interest in the bond.

5. In failing to hold that the Collector of Internal Revenue was a separate entity from the United States.

6. In failing to hold, in any event, that the surety company was liable on the bond only to the named obligee, McCaughn.

## **REASONS FOR GRANTING THE WRIT.**

1. The petition should be granted because the question is of general importance in the construction of Rules 17(a) and 56(c) of the Federal Rules of Civil Procedure and in the application of the law of suretyship to bonds given to secure the payment of federal taxes.

2. In *United States v. Kales*, 314 U. S. 186, and *United States v. Nunnally Investment Co.*, 316 U. S. 258, this Court held that a collector of internal revenue is a separate entity from the United States when in Court as a defendant. The case at bar conflicts in principle with those decisions because it ignores the separate identity of the collector as a plaintiff. The relationship of the United States and a col-



lector—when plaintiffs—should be settled by this Honorable Court to round out the cited cases.<sup>1</sup>

3. The decision below in holding that the United States, though not mentioned in the common law bond, may sue on that instrument is in direct conflict with decisions of the United States Circuit Courts of Appeals for the Second and Eighth Circuits where it has been held that in the absence of some enabling statute the obligee named in a bond must sue upon it. *Bowers v. American Surety Co.*, 2 Cir., 30 F. 2d 244; *United States v. National Surety Corp.*, 8 Cir., 103 F. 2d 450, affirmed 309 U. S. 165; cf. *Reconstruction Finance Corporation v. Teter*, 7 Cir., 117 F. 2d 716, 728, cert. den. 314 U. S. 620. In line with the holdings in the cases just cited is the opinion of the District Court in *Moody v. Megee*, S. D. Tex., 31 F. 2d 117, affirmed, 5 Cir., 41 F. 2d 515, where the United States sought unsuccessfully to recover on a statutory bond naming as obligee only the Governor of Texas.

### CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition should be granted.

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August, 1943.

<sup>1</sup> Congress in Section 503 of the Revenue Act of 1942, 56 Stat. 811, has provided that a suit *against* a collector shall be treated as one against the United States in applying the doctrine of *res judicata*. This legislation, however, does not appear to affect in any way the status of the collector and the United States as plaintiffs.

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UNITED STATES OF AMERICA, *Respondent*.

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**BRIEF IN SUPPORT OF PETITION FOR WRIT OF  
CERTIORARI.**

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For Opinions Below, Jurisdiction, Question Presented,  
Statutes Involved, and Statement of the Case see pages  
~~1~~ to 4 of the Petition.

The United States is not entitled to recover upon a common  
law bond given solely for the protection of and naming  
as obligee only "Blakely D. McCaughn, Collector, First  
District, Pennsylvania."

The statute of limitations on the collection of the taxes  
involved herein, as extended by waiver (R. 50), ran on  
April 30, 1925 (R. 6, 22, 50, 63), while Collector McCaughn  
was still in office (R. 89, 93). Sections 250 (d) of the Reve-  
nue Acts of 1918 and 1921. That McCaughn realized this

seems obvious from his anxiety thereafter to secure an unconditional waiver which was refused (R. 45, 63, 65, 68).

It is, therefore, apparent that in 1921 and until March, 1933, the United States could have instituted suit and recovered from McCaughn, or the surety on his bond, for McCaughn's failure to use the due diligence required of him in collecting the taxes assessed against the coal company. Sections 3651, 3943, and 3950 of the Internal Revenue Code, Appendix, *infra*, pp. 12-14; *United States v. Kimball*, 101 U. S. 726. McCaughn, however, could then have brought suit and recovered from the coal company and the surety company on the bond they gave him. By this orderly procedure the taxes alleged to be due (or an equivalent amount) would have been collected in a proper manner despite the fact that McCaughn allowed the statute of limitations to become a bar against collection of the taxes as such.

*The question here is whether the United States may wait until it is barred from suing for the taxes and from suing the collector for failing to collect the taxes and then short cut the procedure described above by suing directly on an instrument given to the collector which has not been assigned to it (R. 10-11, 65, 91, 94).*

The evidence in the case at bar shows that the common law bond sued on was requested (R. 71) and given (R. 65) "solely" for the "personal protection" of the collector who was himself under a statutory bond to secure the faithful performance of his duties (R. 75-78, 90) and who as such collector was an entity separate and distinct from the United States. *United States v. Kales*, 314 U. S. 186; *United States v. Nunnally Investment Co.*, 316 U. S. 258.

Despite these established facts the United States, on the naked allegation that it is the real party in interest, and with no proof thereof, has prevailed below as against both the principal and the surety.

This Court should not countenance such a belated artifice.

In the past it has been generally understood that only the obligee named in a common law bond may maintain an

action upon it;<sup>2</sup> that the bond (as any other instrument) should—if ambiguous—be construed against the party who prepared it<sup>3</sup> and in the light of the negotiations between the parties and as they interpreted it;<sup>4</sup> and that the liability of a surety may not be extended by implication.<sup>5</sup>

If the foregoing principles are sound then the motion to dismiss should have been granted because: (1) the obligee named in the bond was not the United States (R. 10-11, 65); (2) the material provisions of the bond, including the designation of the obligee, were dictated by the party through whom the United States claims its interest (R. 69-70); (3) the preliminary negotiations (R. 69-72) and the failure of the obligee to assign the bond (R. 10-11, 65, 91, 94) show plainly that it was intended only for McCaughn's "personal protection"; and (4) there is no evidence tending to show that the surety agreed to be bound to anyone other than the named obligee—in fact, the single premium charged of one per cent (instead of the usual annual premium of that amount) negatives such an intention (R. 11).

In looking at the case from another viewpoint it had been considered—prior to the decision on appeal—that Rule 17(a) of the Federal Rules of Civil Procedure did not vary

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<sup>2</sup> *Bowers v. American Surety Co.*, 2 Cir., 30 F. 2d 244; *United States v. National Surety Corp.*, 8 Cir., 103 F. 2d 450, affirmed 309 U. S. 165; *United States v. New Amsterdam Cas. Co.*, S. D. N. Y., 52 F. 2d 148; *Moody v. Megee*, S. D. Tex., 31 F. 2d 117, affirmed 5 Cir., 41 F. 2d 515; *Howard v. United States*, 184 U. S. 676, 691; *Corn Belt Bank v. Maryland Casualty Co.*, 281 Ill. App. 387; STEARNS LAW OF SURETYSHIP, 4th ed. by Feinsinger (1934), Sections 17, 142.

<sup>3</sup> *United States v. Bayly*, 39 App. D. C. 105; STEARNS, *op cit.*, Sec. 235; 11 C. J. S. Bonds, Sec. 39.

<sup>4</sup> *Wilbur Trust Co. v. Eberts*, 10 A. 2d 397, 337 Pa. 161; STEARNS, *op. cit.*, Sec. 128; 11 C. J. S. Bonds, Sec. 40.

<sup>5</sup> *United States v. New Amsterdam Cas. Co.*, *supra*; *Bowers v. American Surety Co.*, *supra*; *United States v. National Surety Corp.*, *supra*; *Corn Belt Bank v. Maryland Casualty Co.*, *supra*; STEARNS, *op. cit.*, Secs. 17, 142; Sullivan, "Suretyship Law in Pennsylvania," 5 Temple Law Quarterly 66.

the substantive law and that the real party in interest was to be determined from the evidence before the Court.<sup>6</sup> The instant proceeding opens the doors under Rule 17(a) to permit anyone remotely claiming under a party to a contract to sue on such contract by merely alleging, without proof, that he is the real party in interest.

Furthermore, the decisions below appear to place a dangerous interpretation on Rule 56(c) of the Federal Rules of Civil Procedure which provides for summary judgment only where there is "no genuine issue as to any material fact". The United States in pressing its motion must, therefore, be deemed to admit that the bond was requested for and given for the "personal protection" of McCaughn (R. 65, 71). Once this fact is established it is difficult to understand the rulings of the courts below in giving judgment on the bond to the United States—a stranger to the instrument. On the other hand, if this fact is not admitted, it is difficult to accept a motion for summary judgment since there would then be a "genuine issue of a material fact".<sup>7</sup>

### CONCLUSION.

It is, therefore, submitted that the coal company and its surety are not liable to the United States on the bond involved herein; that, in any event, the surety company is not liable to the United States on said bond; that the United States Circuit Court of Appeals for the Third Circuit erred in affirming the judgment of the District Court insofar as said judgment was in favor of the United States; and that

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<sup>6</sup> MOORE'S FEDERAL PRACTICE, Sec. 17.06; *Rosenblum v. Dingfelder*, 2 Cir., 111 F. 2d 406; PROCEEDINGS OF CLEVELAND INSTITUTE ON FEDERAL RULES (1938), p. 257.

<sup>7</sup> Cf. *Toebelman v. Missouri-Kansas Pipe Line Co.*, 3 Cir., 130 F. 2d 1016; *Weisser v. Mursam Shoe Corp.*, 2 Cir., 127 F. 2d 344; *Wyant v. Crittenden*, 72 App. D. C. 163, 113 F. 2d. 170.

petitioner's prayer for a writ of certiorari should be granted.

Respectfully submitted,

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August, 1943.

**APPENDIX.****Internal Revenue Code:****SEC. 3651. COLLECTION AUTHORITY.****(a) In General.—**

(1) Within District.—It shall be the duty of the collectors or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be designated.

**(2) Outside District.—**

For authority of collector or deputy to collect taxes by distraint outside his own collection district, but within the State, see Section 3713.

(b) Transferred Assessments.—Whenever a collector has on any list duly returned to him the name of any person not within his collection district who is liable to tax, or of any person so liable who has, in the collection district in which he resides, no sufficient property subject to seizure or distraint, from which the money due for tax can be collected, such collector shall transmit a statement containing the name of the person liable to such tax, with the amount and nature thereof, duly certified under his hand, to the collector of any district to which said person shall have removed, or in which he shall have property, real or personal, liable to be seized and sold for tax. And the collector to whom the said certified statement is transmitted shall proceed to collect the said tax in the same way as if the name of the person and objects of tax contained in the said certified statement were on any list of his own collection district; and he shall upon receiving said certified statement as aforesaid, transmit his receipt for it to the collector sending the same to him.

(26 U. S. C. A. Sec. 3651)

**SEC. 3943. BONDS.**

(a) Original Execution.—Every collector, before entering upon the duties of his office, shall execute a bond for such amount as may be prescribed by the

Commissioner, under the direction of the Secretary, with not less than five sureties, to be approved by the General Counsel for the Department of the Treasury, conditioned that said collector shall faithfully perform the duties of his office according to the law, and shall justly and faithfully account for and pay over to the United States, in compliance with the order or regulations of the Secretary, all public moneys which may come into his hands or possession.

(b) *Renewal*.—Every collector shall, from time to time, renew, strengthen, and increase his official bond, as the Secretary may direct, with such further conditions as the said Commissioner shall prescribe.

(c) *Substitution*.—Every collector shall execute a new bond whenever required so to do by the Secretary, and with such conditions as may be required by law or prescribed by the Commissioner, with not less than five sureties; which new bond shall be in lieu of any former bond or bonds of such collector in respect to all liabilities accruing after the date of its approval by the General Counsel for the Department of the Treasury.

(d) *Filing*.—Said bonds shall be transmitted to the Secretary and filed as he may direct.

(26 U. S. C. A. Sec. 3943)

#### SEC. 3950. CHARGES AND CREDITS.

(a) *Charges*.—Every collector shall be charged with—

(1) *Taxes*.—The whole amount of taxes, whether contained in lists transmitted to him by the Commissioner, or by other collectors, or delivered to him by his predecessor in office, and the additions thereto:

(2) *Stamps*.—The par value of all stamps deposited with him; and

(3) *Moneys*.—All moneys collected for penalties, forfeitures, fees, or costs.

(b) *Credits*.—Every collector shall be credited with—

(1) *Payments into Treasury*.—All payments into the Treasury made as provided by law;



(2) Returned Stamps.—All stamps returned by him uncanceled to the Treasury;

(3) Taxes Transmitted to Other Collectors.—The amount of taxes contained in the lists transmitted in the manner provided in section 3651(b) to other collectors, any by them receipted as therein provided;

(4) Taxes of Insolvent or Absconded Persons.—The amount of the taxes of such persons as may have absconded or become insolvent, prior to the day when the tax ought, according to the provisions of law, to have been collected;

(5) Uncollected Taxes Transferred to Successor.—All uncollected taxes transferred by him or by his deputy acting as collector to his successor in office: *Provided*, That it shall be proved to the satisfaction of the Commissioner, who shall certify the facts to the General Accounting Office, that due diligence was used by the collector; and

(6) Property Purchased for United States.—The amount of all property purchased by him for the use of the United States, provided he faithfully account for and pay over the proceeds thereof upon a resale of the same as required by law.

(26 U. S. C. A. Sec. 3950)

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# In the Supreme Court of the United States

OCTOBER TERM, 1943

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No. 244

THE MORRISDALE COAL COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD  
CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINIONS BELOW

The *per curiam* opinion of the Circuit Court of Appeals (R. 95) is reported at 135 F. (2d) 921. The first opinion of the District Court (R. 81-83) is reported at 46 F. Supp. 356. A second opinion of the District Court, limited to a determination of the amount of judgment in favor of the United States (R. 84-85), is not reported.

(1)

**JURISDICTION**

The judgment of the Circuit Court of Appeals was entered May 10, 1943 (R. 96-97). The petition for a writ of certiorari was filed August 7, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

**QUESTION PRESENTED**

Whether the United States may sue a taxpayer and its surety on a surety bond given to the Collector of Internal Revenue to obtain a postponement in the collection of its tax until the Commissioner of Internal Revenue finally acted upon the taxpayer's claim for abatement of an additional tax assessed against it.

**STATUTE INVOLVED**

The pertinent provisions of the statute involved are printed in the Appendix, *infra*, pp. 8-14.

**STATEMENT**

This suit was brought by the United States in the District Court of the United States for the Eastern District of Pennsylvania, as the real party in interest, pursuant to Rule 17 (a) of the Federal Rules of Civil Procedure, upon a bond given to a former Collector of Internal Revenue (Blakely D. McCaughn, Collector for the First Collection District of Pennsylvania) on December 1, 1921, by the Morrisdale Coal Company, as principal, and the American Re-Insur-

ance Company, as surety, to stay the collection of additional income and excess-profits taxes in the total sum of \$82,262.01 for the years 1917 and 1918 (R. 4-10). American Re-Insurance Company filed an answer (R. 11-16) impleading subsidiary companies of Morrisdale Coal Company, and asked that it be permitted to deposit in court the principal amount of the bond and withdraw from the proceeding. The District Court entered an order on June 21, 1939, as prayed, authorizing American Re-Insurance Company to deposit in court the principal sum of \$82,262.01 plus interest from the date of demand for payment, January 10, 1939, to the date of deposit, and discharging it from further liability (R. 26-27). Morrisdale answered, denying liability and pleading special defenses (R. 21-26).

The proceeding was submitted on a motion for summary judgment filed by the United States (R. 27-28), supported by affidavit and exhibits (R. 28-60), and a motion to dismiss filed by Morrisdale Coal Company (R. 61-62), supported by affidavits and documentary exhibits (R. 62-80). The affidavits covered all of the facts essential to the determination of the issues involved, and such facts are summarized in the District Court's first opinion (R. 81-83).

In August 1921, the Commissioner of Internal Revenue assessed additional taxes against Morrisdale Coal Company in the respective amounts of \$22,804.39 and \$141,719.64 (R. 6, 22, 81). The

Collector of Internal Revenue made demand, and on October 27, 1921, the company filed claims for abatement. On December 1, 1921, the company paid about half of each assessment, leaving an unpaid balance of \$11,402.20 for 1917 and \$70,669.45 for 1918, and the bond here sued on was given in the principal amount of \$82,071.65, to stay collection of this unpaid balance. (R. 6-8, 22-24, 81.)

The obligee of this bond (R. 10-11) was "Blakely D. McCaughn, Collector, First District, Pennsylvania." It recited the assessments for the respective years, the payments on account, and the filing of abatement claims for the balance (R. 11, 81).

In 1925 the Government's claim with respect to additional taxes for 1917 was finally adjusted, and the balance due for that year was paid in 1925 (R. 6-7, 22, 81).

The claim for abatement of the additional assessment for 1918 was denied, and the denial resulted in protracted litigation of the company's liability for the additional assessment for that year and for later years. The Commissioner's determination was affirmed by the United States Board of Tax Appeals in an unreported memorandum opinion and by the Circuit Court of Appeals for the Third Circuit in *Morrisdale Coal Co. v. Commissioner*, 97 F. (2d) 272 (1938).

On January 10, 1939, the Collector made demand on the taxpayer for payment of the outstanding

and unabated portion of the additional assessment for 1918, amounting to \$70,669.45, and on refusal to pay this action was brought (R. 82).

On the basis of the facts before it the District Court ordered judgment entered for the United States (R. 83). In a subsequent opinion, however, that court held that the Government could recover on the bond only to the extent that it applied to 1918 taxes (R. 84-85) and entered judgment for the United States in the sum of \$72,556.65 (R. 85-86). Both parties appealed (R. 86-87), and the District Court's decision was affirmed by the Circuit Court of Appeals for the Third Circuit (R. 95-97).

#### ARGUMENT

There is no sufficient basis for granting certiorari in this case. The proceeding was instituted by the United States as the real party in interest, pursuant to Rule 17 (a) of the Federal Rules of Civil Procedure, to recover on a surety bond given to a former Collector of Internal Revenue to secure a stay in the collection of federal income taxes which had been assessed by the Commissioner of Internal Revenue. One ground urged for granting certiorari is that the question is of general importance in the construction of Rule 17 (a) and also of Rule 56 (c) of the Federal Rules of Civil Procedure (Pet. 5). The argument is that the Government did not prove it was the real party in interest; that the bond in question was given to the former Collector solely for his

personal protection; and that the Collector must be considered as an entity separate and apart from the Government for purposes of the suit on the bond (Br. 7-10).

The bond was given to secure taxes assessed by the Commissioner of Internal Revenue and it ran to McCaughn as Collector of Internal Revenue (R. 10-11). The contention that the Government is not the real party in interest is predicated upon the distorted interpretation of the Collector's request that the bond be filed "for his own protection" (R. 71), as meaning that it was furnished for his "sole protection" (R. 65). The point is wholly without merit. The objection made to the motion for summary judgment, that there was a genuine issue of material fact, is predicated upon the same erroneous theory that the United States is a stranger to the action. The District Court found that there was no dispute as to any fact deemed material (R. 81).

*United States v. Kales*, 314 U. S. 186, and *United States v. Nunnally Investment Co.*, 316 U. S. 258, did not involve the question whether the Collector, instead of the United States, has the right to enforce tax claims. The same distinction applies to these cases which taxpayer asserts in connection with Section 503 of the Revenue Act of 1942, c. 619, 56 Stat. 798. See Brief 6, footnote 1.

The theory upon which a successor Collector is recognized as entitled to sue upon a bond given



to a named Collector "or his successors" (*Fix v. Phila. Barge Co.*, 290 U. S. 530) is sufficiently broad to allow the United States itself to sue. Such a bond was involved in *Gulf States Steel Co. v. United States*, 287 U. S. 32, and the right of the United States to sue upon it was not questioned. If this practice could have been doubtful before, the new Rules of Civil Procedure, effective in 1938, make it clear that the United States may properly institute the action as the real party in interest. There is thus no conflict with the dictum in *Bowers v. American Surety Co.*, 30 F. 2d 244 (C. C. A. 2d), certiorari denied, 279 U. S. 865, or with *United States v. National Surety Corp.*, 103 F. 2d 450 (C. C. A. 8th), affirmed, 309 U. S. 165. They state only a general rule and recognize that there are exceptions. Cf. *United States v. National Surety Corp.*, 309 U. S. 165, 170.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1943.

## APPENDIX

### Internal Revenue Code:

#### SEC. 3640. ASSESSMENT AUTHORITY.

The Commissioner is authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this title, or accruing under any former internal revenue law, where such taxes have not been duly paid by stamp at the time and in the manner provided by law. (U. S. C., Title 26, Sec. 3640.)

#### SEC. 3641. CERTIFICATION OF ASSESSMENT LISTS TO COLLECTORS.

The Commissioner shall certify a list of such assessments when made to the proper collectors, respectively, who shall proceed to collect and account for the taxes and penalties so certified. (U. S. C., Title 26, Sec. 3641.)

#### SEC. 3642. SUPPLEMENTAL ASSESSMENT LISTS.

(a) *Authorization.*—Whenever it is ascertained that any list delivered to any collector is imperfect or incomplete in consequence of the omission of the name of any person liable to tax, or in consequence of any omission, or understatement, or undervaluation, or false or fraudulent statement contained in any return made by any person liable to tax, the Commissioner may, at any time within the period prescribed for assessment, enter on any monthly or special list:

(1) *Original assessments.*—The name of such person so omitted, together with the amount of tax for which he may be liable, and also

(2) *Additional assessments.*—The name of any such person in respect to whose return, as aforesaid, there has been any omission, undervaluation, understatement, or false or fraudulent statement, together with the amount for which such person may be liable, above the amount for which he may have been assessed upon any return made as aforesaid.

(b) *Certification to Collector.*—The Commissioner shall certify and return such list to the collector as required by law. (U. S. C., Title 26, Sec. 3642.)

#### SEC. 3643. OTHER LAWS APPLICABLE.

All provisions of law for the ascertainment of liability to any tax, or the assessment or collection thereof, shall be held to apply, so far as may be necessary, to the proceedings authorized and directed under this chapter. (U. S. C., Title 26, Sec. 3643.)

#### SEC. 3651. COLLECTION AUTHORITY.

(a) *In General.*—

(1) *Within district.*—It shall be the duty of the collectors or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be designated.

\* \* \* \* \*

(U. S. C., Title 26, Sec. 3651.)

#### SEC. 3659. RECEIPTS FOR TAXES.

(a) *In General.*—Every collector and deputy collector shall give receipts for all sums collected by him, excepting only when and delivered; \* \* \*. (U. S. C., Title 26, Sec. 3659.)

ed., Title 26, Sec. 3659.)

**SEC. 3740. AUTHORIZATION TO COMMENCE SUIT.**

No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced. (U. S. C., Title 26, Sec. 3740.)

**SEC. 3743. REGULATIONS.**

It shall be the duty of the Commissioner, with the approval of the Secretary, to establish such regulations, not inconsistent with law, for the observance of revenue officers, respecting suits arising under the internal revenue laws in which the United States is a party, as may be deemed necessary for the just responsibility of those officers and the prompt collection of all revenues and debts due and accruing to the United States under such laws. (U. S. C., Title 26, Sec. 3743.)

**SEC. 3744. SUITS FOR TAXES.**

Taxes may be sued for and recovered in the name of the United States in any proper form of action, before any district court of the United States, for the district within which the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of the said action. (U. S. C., Title 26, Sec. 3744.)

**SEC. 3745. SUITS FOR FINES, PENALTIES, AND FORFEITURES.**

\* \* \* \* \*

(c) *Plaintiff, Proceedings, and Venue.*—All suits for fines, penalties, and forfeitures, where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any ap-

propriate form of proceeding, qui tam or otherwise, before any district court of the United States for the district within which said fine, penalty, or forfeiture may have been incurred, or before any other court of competent jurisdiction.

\* \* \* \* \*

(U. S. C., Title 26, Sec. 3745.)

SEC. 3747. DISPOSITION OF JUDGMENTS AND MONEYS RECOVERED.

All judgments and moneys recovered or received for taxes, costs, forfeitures, and penalties, shall be paid to collectors as internal revenue taxes are required to be paid. (U. S. C., Title 26, Sec. 3747.)

SEC. 3770. AUTHORITY TO MAKE ABATEMENTS, CREDITS, AND REFUNDS.

(a) *To Taxpayers.*—

(1) *Assessments and collections generally.*—Except as otherwise provided by law in the case of income, estate, and gift taxes, the Commissioner, subject to regulations prescribed by the Secretary, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected.

\* \* \* \* \*

(b) *To Collectors and Officers.*—The Commissioner, subject to regulations prescribed by the Secretary, is authorized to repay—

(1) *Collections recovered.*—To any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expense of suit; also

(2) *Damages and costs.*—All damages and costs recovered against any collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty. (U. S. C., Title 26, Sec. 3770.)

SEC. 3791. RULES AND REGULATIONS.

(a) *Authorization.*—

(1) *In general.*— \* \* \* the Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

\* \* \* \* \*

(U. S. C., Title 26, Sec. 3791.)

SEC. 3901. POWERS AND DUTIES.

(a) *Assessment and Collection.*—The Commissioner, under the direction of the Secretary—

(1) *General superintendence.*—Shall have general superintendence of the assessment and collection of all taxes imposed by any law providing internal revenue; and

(2) *Regulations, forms, stamps, and dies.*—Shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue; \* \* \*

(U. S. C., Title 26, Sec. 3901.)

SEC. 3943. BONDS.

(a) *Original Execution.*—Every collector, before entering upon the duties of his office, shall execute a bond for such amount as may be prescribed by the Commissioner, under the direction of the Secretary, with not less than five sureties, to be approved by the General Counsel for the Department of the Treasury, conditioned that said col-

lector shall faithfully perform the duties of his office according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the order or regulations of the Secretary, all public moneys which may come into his hands or possession.

\* \* \* \* \*

(d) *Filing*.—Said bonds shall be transmitted to the Secretary and filed as he may direct. (U. S. C., Title 26, Sec. 3943.) 3943.)

SEC. 3950. CHARGES AND CREDITS.

(a) *Charges*.—Every collector shall be charged with—

(1) *Taxes*.—The whole amount of taxes, whether contained in lists transmitted to him by the Commissioner, or by other collectors, or delivered to him by his predecessor in office, and the additions thereto;

\* \* \* \* \*

(b) *Credits*.—Every collector shall be credited with—

\* \* \* \* \*

(3) *Taxes transmitted to other collectors*.—The amount of taxes contained in the lists transmitted in the manner provided in section 3651 (b) to other collectors, and by them receipted as therein provided;

\* \* \* \* \*

(5) *Uncollected taxes transferred to successor*.—All uncollected taxes transferred by him or by his deputy acting as collector to his successor in office: *Provided*, That it shall be proved to the satisfaction of the Commissioner, who shall certify the facts to the General Accounting Office, that due diligence was used by the collector; and

\* \* \* \* \*

(U. S. C., Title 26, Sec. 3950.)

SEC. 3962. COMPLETION OF COLLECTIONS.

(a) *Accounts Generally.*—Every collector shall complete the collection of all sums assigned to him for collection and shall pay over the same into the Treasury.

(b) *Predecessor Collector's Accounts.*—In case of the death, resignation, or removal of any collector, all lists and accounts of taxes uncollected shall be transferred to his successor in office as soon as such successor is appointed and qualified, and it shall be the duty of such successor to collect the same. (U. S. C., Title 26, Sec. 3962.)

SEC. 3971. DEPOSIT OF COLLECTIONS.

(a) *General Rule.*—Except as provided in subsection (b), the gross amount of all taxes and revenues received under the provisions of this title, and collections of whatever nature received or collected by authority of any internal revenue law, shall be paid daily into the Treasury of the United States under instructions of the Secretary as internal revenue collections, by the officer receiving or collecting the same, without any abatement or deduction on account of salary, compensation, fees, costs, charges, expenses, or claims of any description. A certificate of such payment, stating the name of the depositor and the specific account on which the deposit was made, signed by the Treasurer, designated depositary, or proper officer of a deposit bank, shall be transmitted to the Commissioner.

\* \* \* \*

(U. S. C., Title 26, Sec. 3791.)